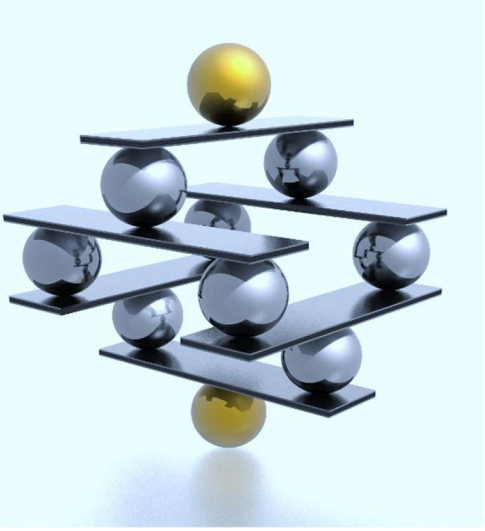
DISCOVERY AND USE OF IMMIGRATION INFORMATION IN COURT CHECKLIST



Balancing the Due Process Right of the Party Seeking Immigration Information, the Privacy Rights of the Noncitizen Victim or Witness, and the Policy Considerations of the Violence Against Women Act

1. Are there confidentiality statutes that protect the immigration information?

- ☐ Senate Bill 785 (2018) - Evidence Code §§ 351.3 (civil) and 351.4 (criminal), regarding in-camera hearing procedures when a party seeks to offer evidence of another person's immigration information.
- ☐ Penal Code §§ 679.10(k) (U Visa certifications) and 679.11(k) (T Visa certifications), prohibiting disclosure of the immigration status of a victim or person requesting the certification.
- ☐ VAWA Confidentiality - 8 U.S.C. § 1367, prohibiting disclosure of applicant victim's immigration information (See also 8 C.F.R. §§ 214.11(p) and 214.14(e); *Hawke v. Dep't of Homeland Security*, 2008 U.S. Dist. LEXIS 87603, 2008 WL 4460241 (N.D. Cal. 2008)(finding Sixth Amendment right to compulsory process does not permit discovery of absolutely privileged information like VAWA Confidentiality protected immigration information from DHS).
- ☐ Consider the policy and purpose of these statutes: Will disclosure compromise victim's safety or dissuade victim from testifying? Will allowing the disclosure create a chilling affect for other victims or witnesses from participating/ testifying?

2. Is the attempt by a party to have the court consider the immigration status of the victim a further form of abuse and manipulation?

- ☐ Consider: Is this an abuse tactic or a legitimate legal position?
- ☐ Is a party trying to invoke bias rather than raising a legitimate factual issue?
- ☐ Is immigration status being raised as a negative factor against the victim?
- ☐ Have there been any allegations by the victim of past immigration-related threats or abuse by the other party?

3. Is use of the information in court relevant to an affirmative defense?

- ☐ Is the VAWA Self-Petition or Application for a U or T Visa relevant to a material fact needed to be proven by one of the parties in court?

4. Is the information relevant to credibility?

- ☐ Consider whether court testimony, the filing of a police report, the filing of a petition for custody and support in family court, *etc.* is a requirement for obtaining a U or T Visa certification, or a VAWA Self-Petition? If not, is this discovery relevant to credibility?
- ☐ Consider the timing of the filing of the petition or application: When did the party filing an application first learn about this form of immigration relief (*i.e.*, during the sexual assault exam, during the filing of the police report, after testifying at preliminary hearing). If the noncitizen party learned about the immigration benefit after the case began, is the filing relevant to credibility?
- ☐ Evidence Code § 352: If jurors learn of a victim's immigration status, will that (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury? If so, does that substantially outwiegh the probative value of the evidence? Will use of the victim's immigration information open the door to inquiries about the defendant's own immigration status and create a negative perception of the defendant in front of the jury?
- ☐ Consider whether the use of the immigration information is cumulative to other forms of impeachment - *e.g.*, did the victim recant? What other kinds of impeachment already exist such as substance abuse, intoxication, *etc.*?

5. Is the application and/ or immigration status relevant to parenting, custody, support (or other issue)?

- ☐ Family Code § 3040(b) - immigration status shall not disqualify a parent, legal guardian or relative from receiving custody when determining a child's best interest.
- ☐ In Hague Convention cases, see *In re B. Del C.S.B.*, 559 F.3d 999, 1014 (9th Cir. 2009) (finding undocumented child to be well-settled in U.S. based on totality of factors, and that "[i]mmigration status cannot be determinative for purposes of the 'settled' inquiry if … there is no imminent threat of removal"); See also *Demaj v. Sakaj*, 2012 U.S. Dist. LEXIS 18159, 2012 WL 476168 (D. Conn. 2012) (denying discovery of U-Visa application materials for impeachment purpose in Hague Convention case).

6. Is the discovery request overbroad or burdensome?

- ☐ Consider *Hawke v. Dep't of Homeland Security* (N.D. Cal. 2008) (VAWA Self-Petition case), which states, "one of the primary purposes of the VAWA confidentiality provision … [is] to prohibit disclosure of confidential application materials to the accused batter," so as to ensure that batterers cannot use the immigration system against their victims. 2008 U.S. Dist. LEXUS 87603 at 19-20. Consider disclosing the fact that the petition or visa request exists, if relevant, rather than the underlying materials.

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